

Remand Stakeholder Engagement Process

Section 7 ESA and NEPA Compliance for the Remanded Biological Opinions on the Coordinated, Long-Term Operation of the Central Valley Project and State Water Project

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Introduction

The Bureau of Reclamation (Reclamation) began formal consultation in 2008 with the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) on the coordinated, long-term operation of the Central Valley Project (CVP) and the State Water Project (SWP) pursuant to section 7 of the Endangered Species Act (ESA). The biological opinions (BiOps) issued by the FWS and NMFS (collectively, the Services) were remanded by the U.S. District Court for the Eastern District of California and both agencies were ordered to issue new BiOps. In addition, Reclamation was ordered by the court to comply with the National Environmental Policy Act (NEPA) prior to accepting and implementing the action described in the new BiOps to be issued by the FWS and NMFS (collectively, the Services). Because the BiOps will address the operation of the SWP, it is expected that the remand process will support development of a Consistency Determination under the California ESA for the operation of the SWP in coordination with the CVP.

In the course of the remand and NEPA processes, Reclamation will undertake the “remand stakeholder engagement process” (RSE process) described in this paper. The impetus for the RSE process is the discussions held in the fall of 2011 between certain parties in the *Consolidated Salmonid Cases* and *Consolidated Delta Smelt Cases*. These discussions attempted to reach a stipulated agreement regarding a schedule and process for the participation of non-Federal parties in the remand and NEPA processes. While an agreement was not reached, the commitments made by Reclamation during those discussions which are within its purview will be voluntarily effected through the RSE process.

Reclamation, FWS, and NMFS must meet the deadlines ordered by the court.¹ Accordingly, there will be limits on the time available for the RSE process. Furthermore, final decisions regarding the EIS, the content of information to be submitted by Reclamation to supplement its 2008 biological assessment (BA), the proposed action to be consulted upon, and the acceptance of RPAs, if any, proposed by the Services are legally committed to Reclamation’s discretion and necessarily rest with it.

¹ December 2013 for the FWS Final BiOp, Reclamation decision on that BiOp and any RPA, and completed NEPA review. February 2016 for the NMFS Final BiOp, Reclamation decision on that BiOp and any RPA, and EIS, with the ROD due by April 2016.

General Approach to the Remand and NEPA Processes

Reclamation anticipates providing supplemental information to the Services which updates its 2008 BA. This information may be presented as a supplemental BA, an entirely new BA, or in some other format. A decision in this regard will be made at a later date.

In order to coordinate the remand of the FWS BiOp with the NEPA process, Reclamation will provide supplemental information to the FWS by March, 2013. NMFS has stated that to meet the court deadline of April 2016 for its new BiOp, Reclamation must provide supplemental information -- with minimal changes to the proposed action -- by August 2013. If more than minimal changes are proposed, then supplemental information may have to be provided sooner.

The action to be addressed in the remand, whether consisting of the RPAs in the remanded BiOps or revisions to them, will have two components: (i) the coordinated, long-term operation of the CVP and SWP; and (ii) structural modifications to project facilities. Collectively, these were referred to as the “project description” in the 2008 BA. For the remand, the action may also include measures to minimize or offset the adverse effects of the coordinated, long term operation of the CVP and SWP on listed species.

The action which is subject to the remand process will be the “preferred alternative” identified in the final EIS. Given that the court has ordered the FWS’s new BiOp to be completed by December 2013, which is more than two years before the deadline for the NMFS’s new BiOp, the EIS will have to proceed concurrently with the remand of the FWS BiOp.

As required by the court’s order, an EIS will be completed by December 2013. If the NMFS’s final BiOp, which is not due for more than another two years, calls for actions which differ significantly from the preferred alternative selected in the 2013 EIS and the accompanying Reclamation Record Of Decision (ROD), then the 2013 EIS and ROD may have to be supplemented or otherwise revised before Reclamation can proceed with the implementation of the action (or RPA) which is the subject of NMFS’s final BiOp.

Overview of the RSE Process

Typically, section 7 consultations between an “action agency” such as Reclamation and one or both Services have involved only the Federal agencies, or have provided only limited opportunities for input from non-Federal parties.

However, for the remand, the RSE process will provide non-Federal parties a more formal structure in which to engage with Reclamation and each other for the purpose of understanding key issues and perspectives and providing information which will inform Reclamation’s decision making. Subject to the constraints of the court ordered deadlines and the limitations of any applicable laws, this will be done in three ways.

First, Reclamation has determined that DWR qualifies as an “applicant” within the meaning of section 7 of the ESA. Accordingly, Reclamation will work closely with DWR to successfully complete the remand process and DWR will participate in the RSE process by virtue of its being

the applicant. In addition, DWR will be a cooperating agency for the EIS.

Second, Reclamation recognizes that there are many entities in addition to DWR which have an interest in the remand process even though they do not qualify as applicants under section 7. Accordingly, in addition to DWR as an applicant, Reclamation will invite water agencies which are representative of the range of CVP and SWP contractors and commercial fishing and environmental organizations which represent a range of publics interested in the Bay-Delta (collectively, “invited stakeholders”) to participate in structured, facilitated discussions and exchanges of information regarding certain aspects of the remand and NEPA processes. In light of their interests and responsibilities, Reclamation will also invite the California Department of Fish and Game (DFG), FWS, and NMFS (collectively, the fish resource agencies) to participate in its discussions with DWR and invited stakeholders, particularly regarding core scientific issues.

Third, while the RSE process will focus on receiving information and input from the invited stakeholders, Reclamation may also invite input from other interested parties on matters germane to the coordinated, long term operation of the CVP and SWP. This will be done on an ad hoc basis as time permits.

With regard to invited stakeholders, Reclamation has also designated, or will offer to designate, each invited water agency as a non-Federal representative pursuant to 50 CFR 402.08. This is being done in recognition of their role as governmental entities which have a contractual relationship with Reclamation and/or DWR.

Facilitated Engagement with DWR and the Invited Stakeholders

Reclamation is committed to an RSE process that is balanced, open, understandable, and appropriately transparent, that contributes to the development of required information, and that assists in informing Reclamation’s decision making and, potentially, that of the fish resource agencies. Through structured, professionally facilitated processes, DWR and all invited stakeholders will be afforded the opportunity to provide input to, and to engage with, Reclamation, as will the fish resource agencies if they choose to participate in the RSE process. This will be done through requests for information from DWR and the invited stakeholders and through discussions and exchanges with Reclamation about the information provided to it and about the conduct and status of the remand and NEPA processes.

DWR and the invited stakeholders will not constitute a Federal advisory committee tasked with providing advice to Reclamation. Rather, DWR and the invited stakeholders will each speak for themselves to provide such information and input to Reclamation as it deems appropriate. Reclamation will consider points of agreement as well as disagreement among DWR and invited stakeholders, but will not seek a consensus.

Furthermore, the RSE process is not intended to be a single “negotiating table,” but rather a flexible process that uses a combination of formats. Thus, Reclamation will meet with DWR and invited stakeholders individually, in different combinations, and collectively, and will invite the fish resource agencies to participate as appropriate. Meetings likely will be a combination of

face-to-face gatherings, web-based events, and conference calls. They will be conducted in formats most conducive to the purpose to be served (e.g., general discussion meetings, technical workshops, panel presentations, information only meetings, etc.) and in compliance with all applicable Federal and state laws regarding open meetings. All meetings will be subject to yet to be developed ground rules that will address access by the broader public and media, audio or video recording, live Web streaming, use and distribution of meeting notes, etc. A successful RSE process will depend on acceptance of ground rules by all invited stakeholders.

The RSE process will engage DWR and invited stakeholders at both the management and technical levels. Some interactions will be heavily oriented to information and data exchange and scientific issues and will, therefore, involve an invited stakeholder's technical staff and consultants. Other interactions will be focused on key interests and policy questions and will, therefore, involve management personnel.

Throughout the remand and NEPA processes, Reclamation will hold regularly scheduled meetings with management level representatives of DWR and the invited stakeholders (singly, in various combinations, and collectively) to discuss the conduct and progress of the two processes and to address major issues. Meetings with technical staff and consultants will be scheduled on an ad hoc basis to address scientific and technical tasks and issues. The fish resource agencies will be invited to participate.

Reclamation will keep a running list of meetings which it holds as part of the RSE process with subsets of DWR and the invited stakeholders. Brief summaries of such meetings indicating the participants and their affiliations, the meeting date, and the general topics discussed will be made available to all participants in the RSE process. Written information (either paper or in electronic format) received by Reclamation from DWR, invited stakeholders, and the fish resource agencies in the course of the RSE process will be made available to all participants (probably through posting on a public website).

DWR and Invited Stakeholder Participation in the Remand Process

To the extent permitted by the court ordered schedules, Reclamation will involve DWR and the invited stakeholders in the remand process at the following junctures, with the fish resource agencies also being invited to participate as appropriate:

- A science review process will be organized and supported by Reclamation for the purpose of identifying potentially useful information and gathering input from DWR and the invited stakeholders on a defined set of core scientific issues. The design of this science review process, and the identification of core scientific issues, will be among the first items on which Reclamation will seek input. A separate paper describing this science review process will be developed by Reclamation.
- DWR and the invited stakeholders will be afforded the opportunity to provide new information and analyses to Reclamation, to include new data and scientific studies on the effects of project operations and other factors on the listed species, and on the status of the listed species and of their designated critical habitats.

- Before supplemental information (in whatever format) is formally submitted by Reclamation to FWS and/or NMFS, Reclamation will provide DWR and the invited stakeholders with the opportunity to review and comment on it.
- Reclamation will seek input from DWR and the invited stakeholders regarding the description of the action to be addressed in the remand process.
- Reclamation will regularly update DWR and the invited stakeholders on the discussions and communications it is having with the Services, including questions or requests for information received by Reclamation from the Services.
- When draft BiOps are received from the Services, Reclamation will provide them to DWR and the invited stakeholders for their review and comment, subject to such schedules as those two agencies may require. Reclamation will consider any comments it receives when formulating its responses to the draft BiOps.
- If it appears that the BiOps will be jeopardy opinion(s), DWR and the invited stakeholders will be afforded the opportunity to provide input to Reclamation on the development of a BiOp's RPA and on suggested alternatives to a proposed RPA. Such input will be considered by Reclamation in formulating its responses to the FWS and NMFS.

DWR and Invited Stakeholder Participation in the NEPA Process

In addition to what is required by the NEPA regulations (i.e., public scoping meetings, a scoping report, and public review of a draft EIS), Reclamation will involve DWR and the invited stakeholders in the NEPA process at the following junctures to the extent the court ordered schedules permits, with the fish resource agencies being invited to participate as appropriate:

- Reclamation will invite DWR, DFG, water agencies (invited stakeholders and otherwise), and other governmental entities, as appropriate, to become cooperating agencies for the EIS. The cooperating agencies will be able to provide input during the development of the EIS as provided by the NEPA regulations.
- As provided by the NEPA regulations, the cooperating agencies will be allowed to review and comment on the administrative draft(s) of the EIS. In addition, invited stakeholders who are not cooperating agencies will, as part of the RSE process, be afforded the opportunity to review and comment on the administrative draft.
- Through the RSE process, but consistent with the requirements of the NEPA regulations, Reclamation will meet with the invited stakeholders to receive their input on issues and concerns that will be considered in the development of alternatives.
- In addition to providing the draft EIS for public review and holding public meetings to take comment on it, Reclamation will meet with the invited stakeholders to discuss their comments if requested to do so and if time permits.

Reclamation's Management of the Remand, NEPA, and RSE Processes

The Mid-Pacific Region's Bay-Delta Office has the lead responsibility for the remand and NEPA processes, and for the RSE process. This office will be assisted by other offices in the Mid-Pacific Region. In addition, Reclamation has already procured, and/or will be procuring, the

services of consulting firms to assist in the preparation of the EIS and of the supplemental information for the remands.

As it committed it would do, Reclamation has obtained the services of an individual experienced in managing complex EISs and section 7 ESA consultations. That individual is Bill McDonald (Staff Tech, Inc.), the recently retired Regional Director of Reclamation's Pacific Northwest Region. He will assist Reclamation with the integration of the remand and NEPA processes and with the RSE process, to include interfacing regularly with DWR, the invited stakeholders, and the fish resource agencies.

Reclamation has also obtained an experienced professional facilitator, J. Michael Harty (Kearns & West), to assist with RSE process design and implementation. His team's responsibilities will include developing meeting or discussion formats and ground rules for participation, facilitating meetings and workshops, promoting constructive communication and the sharing of information, and tracking action items that result from meetings, workshops, or discussions.

Messrs. Harty and McDonald will work together closely in effecting the RSE process under the direction of the Bay-Delta Office.